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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 424 of 1988
with
First Appeal No.425 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NATIONAL INSURANCE CO.LTD.

Versus

DAMODAR MAVJIBHAI KANABAR

Appearance:
MR RAJNI H MEHTA for appellant
NOTICE SERVED for Respondent No. 1
MR SURESH M SHAH for Respondent No. 2, 3, 4

CORAM : MR.JUSTICE M.H.KADRI
Date of decision: 06/12/1999

COMMON CAV JUDGEMENT

1. First Appeal No.424 of 1988 is filed by appellant, National Insurance Company Limited, under Section 110-D of the Motor Vehicles Act, 1939('Act' for short) challenging common judgment and award dated December 19, 1987, rendered by the Motor Accidents Claims Tribunal (Main), Junagadh, in M.A.C. Petition No.423 of 1983, whereby, the Tribunal awarded a sum of Rs.49,000/as compensation for the injuries sustained by respondent No.1 in a vehicular accident, to be recovered from the appellant as well as respondents Nos. 2, 3 and 4.

2. First Appeal No.425 of 1988 is filed by

appellant, National Insurance Company Limited, under Section 110-D of the Act challenging common judgment and award dated December 19, 1987, rendered by the Motor Accidents Claims Tribunal (Main), Junagadh, in M.A.C. Petition No.424 of 1983, whereby, the Tribunal awarded a sum of Rs.35,000/- as compensation for the injuries sustained by respondent No.1 in a vehicular accident, to be recovered from the appellant as well as respondents Nos. 2, 3 and 4. As both the appeals arise out of one accident and against common judgment and award rendered by the Motor Accidents Claims Tribunal (Main), Junagadh, and as common questions of fact and law are involved, both the appeals are disposed of by this common judgment.

3. On December 24, 1982, respondent No.1 (hereinafter referred to as 'claimants') in both the appeals had engaged Matador belonging to respondents Nos. 2 and 3 bearing Registration No. GTW 5526 on hire for going to Bhandara of Kalimali Bapu. The claimants had gone to Bhandara on December 24, 1992 in night hours by the said Matador wherein they had stacked food grains such as sugar, jaggery, ghee, flour, vegetables, etc. The claimants were travelling in the said Matador along with the goods. After delivering the goods at Bhandara and attending the bhajans, the claimants were returning to their village Malia-Hatina. As per the case of the claimants, Matador was driven by the driver at a high speed and negligently so as to endanger human life. When the Matador came near the railway crossing of village Malia-Hatina, the driver tried to take a turn, but, because of high speed, the Matador turned turtle and fell in a ditch. The claimants sustained injuries in the accident. The claimant of First Appeal No.424 of 1988 had filed M.A.C.P. No.423 of 1983 against the appellant and respondents Nos. 2, 3 and 4 claiming compensation of Rs.75,000/-, whereas claimant of First Appeal No.425 of 1988 had filed M.A.C.P. No.424 of 1983 against the appellant and respondents Nos. 2, 3 and 4 claiming compensation of Rs.50,000/-, for the injuries sustained by them in the vehicular accident. Opponents Nos. 1, 2 and 4 filed joint written statement in both the claim petitions, inter alia, contending that Matador was not driven at a high speed but the accident happened as one bullock-cart was coming from opposite direction and due to turning point and to save the bullock-cart, the driver of the Matador slowed down the Matador but due to failure of brakes it slipped and fell in the nearby ditch. It was contended that, in spite of due care and action taken by the driver, the accident had taken place beyond the control of the driver. It was further contended that the

owner and the driver of Matador were not liable to pay any compensation and the claim petitions be dismissed with costs.

4. The appellant-Insurance Company filed its written statement at Exh.29 in both the claim cases, inter alia, contending that the insured vehicle was expressly or impliedly not covered by permit to carry passengers for hire or reward and there was specific condition in the insurance policy which excluded use of insured vehicle for carriage of any passenger for hire or reward. It was pleaded that the vehicle was used in clear breach of specific condition of policy and, therefore, the Insurance Company was not liable to pay any amount of compensation nor was liable to indemnify the insured and the claim petitions be dismissed with costs. Both the claim petitions were consolidated and common issues were framed by the Tribunal at Exh.26.

5. Before the Tribunal, claimant, Damodar Mavjibhai (respondent No.1 in First Appeal No.424 of 1988) was examined at Exh.91 and Dayalal Haridas (respondent No.1 in First Appeal No.425 of 1983) was examined at Exh.93. On behalf of the opponents, no witness was examined. The claimants produced first information report at Exh.33, panchanama at Exh.34 to prove that the accident had taken place due to rash and negligent driving by the driver of Matador. On appreciation of oral as well as documentary evidence, the Tribunal held that the driver of Matador No.GTW 5526 was driving the vehicle rashly and negligently and he was responsible for causing the accident.

6. The Tribunal, on quantum of compensation, held that claimant, Damodar Mavjibhai, suffered fracture on left leg and right hand and he had also suffered permanent partial disability on his left leg. The Tribunal, taking into consideration the nature of injuries and income of claimant, Damodar Mavjibhai, awarded compensation of Rs.49,000/- to be recovered from the appellant as well as opponents Nos. 2, 3 and 4 jointly and severally with interest and proportionate costs. The Tribunal awarded compensation of Rs.35,000/- to the claimant, Dahyalal Haridas, of M.A.C.P. No.424 of 1983 for sustaining fracture of left leg. The Insurance Company in both the appeals have not challenged the quantum of compensation but has only challenged its liability to indemnify the insured as the claimants, i.e respondent No.1 of each First Appeal, were passengers carried in a goods vehicle in breach of the terms of the policy and the permit. It is borne out from the record of the case that both the claimants were travelling in Matador bearing GTW 5526 with

their goods in the night of December 24, 1982 and had gone to Bhandara of Kalimali Bapu and while returning from Bhandara of Kalimali Bapu, had sustained injuries in a vehicular accident.

7. Learned counsel for the appellant-Insurance Company has vehemently submitted that the claimants were travelling in the goods vehicle, namely, Matador bearing No.GTW 5526, along with their goods by paying fare which was clearly in breach of policy issued to the insured under Section 95 of the Act. It is submitted that the policy did not cover the risk of passengers, who were carried in the goods vehicle along with their goods by taking fare. It was submitted that, if the passengers were carried in a goods vehicle by charging fare, it was clearly in breach of the terms of the policy and permit issued to the owner of the goods vehicle and, therefore, the Insurance Company was not liable to indemnify the insured. Learned counsel for the appellant further submitted that, admittedly, the claimants were traveling in the goods vehicle by paying fare along with their goods and, therefore, the present case is squarely covered by the decision of the Supreme Court in the case of Smt. Mallawwa vs. The Oriental Insurance Company Limited & Others, reported in JT 1998 (8) SC 217. Before the Apex Court in a group of matters being C.As. Nos. 1478/87, 6001/90, 6002/90, 2098/96, 5872/94, SLP (C) Nos. 10745, 19747 and 10748/95, the deceased were travelling in goods vehicle as passengers who had succumbed to injuries, prior to introduction of Motor Vehicles Act, 1988. Therefore, the facts of the present case are similar to the facts of those cases before the Supreme Court. It may be mentioned that in these appeals also as the accident had taken place on December 24, 1982 and, therefore, Motor Vehicles Act, 1939 shall be applicable. The Supreme Court, after considering the provisions of Section 95 of the Act, concluded that the owner of a goods vehicle cannot claim indemnification from the insurer in case the goods vehicle had carried passenger by taking fare. This would perhaps robe the third proviso dealing with the contractual liability lame. In view of the pronouncement of the Supreme Court in the case of Smt. Mallawwa (supra) a passenger who, by paying fare, is carried in a goods vehicle will not be covered under the policy issued under Section 95 of the Act. Therefore, the appellant-Insurance Company shall have to be exonerated from the payment of compensation awarded by the Tribunal.

8. Learned advocate for the original claimants vehemently submitted that there was no evidence produced

before the Tribunal to show that there was a systematic carrying of passengers in goods vehicle. It is submitted that only if the vehicle is so used often, then that vehicle can be said to be a vehicle in which passengers are carried for hire. If the submission of the learned advocate for the original claimants is accepted, then the whole object of the Act and particularly section 95 would be frustrated. No doubt, the Act is a beneficial legislation and one would normally prefer a liberal interpretation, but the question which arises, is whether without paying extra premium, the owner of the vehicle can claim indemnification from the insurer after taking fare from passengers which is in clear breach of terms of the policy. If the argument of the learned advocate for the original claimants is accepted, then hardly there would be any evidence before the Tribunal that the vehicle was systematically and habitually used for carrying passengers for hire. That would lead to a disastrous situation. The Supreme Court in Smt. Mallawwa's case (supra) observed as under:

"Thus, to find out whether an insurer would be liable to indemnify an owner of a goods vehicle in a case of the present nature, the mere fact that the passenger was carried for hire or reward would not be enough, it shall have to be found out as to whether he was the owner of the goods or an employee or such an owner, and then whether there were more than six persons in all in the goods vehicle and whether the goods vehicle was being habitually used to carry passengers. The position would thus become very uncertain and would vary from case to case. Production of such result would not be conducive to the advancement or the object sought to be achieved by requiring a compulsory insurance policy."

9. The Apex Court, in Smt. Mallawwa's case (supra) had approved the observations made in the decision of the Orissa High Court in the case of New India Assurance Company v. Kanchan Bewa & Others, (1994 ACJ 138) that "there is another aspect of the matter which has led us to differ from the Full Bench decision of Rajasthan High Court. The same is what finds place in sub-section (2) of Section 95. That sub-section specifies the limits of liability and clause (a) deals with goods vehicle; and in so far as the person travelling in goods vehicle is concerned, it has confined the liability to the employees only. This is an indicator, and almost a sure indicator, of the fact that legislature did not have in mind carrying of either the hirer of the vehicle or his employee in the goods vehicle, otherwise, clause (a) would have provided a limit of liability regarding such persons also."

10. After quoting the above observation of the Full Bench of Orissa High Court, the Apex Court held that "though a conclusion was arrived at after taking into consideration the Orissa Motor Vehicle Rules, in our opinion, the said view is correct, even otherwise also, in view of what we have said, the contrary view expressed by other High Courts has to be regarded as incorrect".

11. Thus, the legal position is clear that the Legislature did not permit carrying of passengers in a goods vehicle by paying fare, otherwise, clause (1) of Section 95(2) would have provided a limit of liability regarding such persons also. In the present appeals, the claimants were carried as passengers in the goods vehicle along with their goods by charging fare which was not covered by the Insurance Company. Furthermore, under the permit issued to a goods vehicles, carrying of passengers in the said vehicle was prohibited. In view of the pronouncement of the Apex Court in the case of Sat. Mallawwa (supra), the insurance company cannot be held liable to indemnify the insured to pay compensation. Therefore, the insurance company shall have to be exonerated from liability of paying any compensation to the claimants of both the appeals.

12. As a result of the foregoing discussion, both the appeals are allowed. The common judgment and award dated December 19, 1987, rendered by the Motor Accidents Claims Tribunal (Main), Junagadh, in M.A.C. Petition Nos.423 of 1983 and 424 of 1983, qua the appellant, is set aside, and the appellant-original opponent No.3 (National Insurance Company Limited) is exonerated from the liability to pay compensation to the original claimants. The impugned common judgment and award dated December 19, 1987 rendered by the Motor Accidents Claims Tribunal (Main), Junagadh, in M.A.C. Petition Nos.423 of 1983 and 424 of 1983, is modified to the extent that the compensation awarded to the claimants of both the claim petition shall be paid by respondents Nos. 2, 3 and 4, i.e. original opponents Nos. 1, 2 and 4 jointly and severally with interest and proportionate costs of the claim petitions. The order of disbursement and investment passed by the Tribunal in both the claim petitions in favour of the claimants is hereby not disturbed and confirmed. The impugned award be modified in terms of this judgment. There shall be no order as to costs.

(swamy)